NEW LAWS

Operating with a Restricted Controlled Substance. 2003 Wis. Act 97 effective 12/19/03.

This act prohibits a person from operating a motor vehicle, an ATV, a snowmobile, or a motorboat or operating or going armed with a firearm if he or she has a detectable amount of a restricted controlled substance in his or her blood, regardless of whether the person 's ability to operate has been impaired.

The act defines a restricted controlled substance as: 1) delta-9-tetrahydrocannabinol (the primary active ingredient in marijuana); 2) a controlled substance (other than marijuana) included in Schedule I under the state's controlled substance law, which includes heroin, LSD, PCP, and certain "club drugs"; 3) cocaine or any of its metabolites; and 4) methamphetamine. Penalties for violating one of these prohibitions relating to vehicles are the same as those that would apply if the person had a prohibited alcohol concentration or had been under the influence of an intoxicant.

A person has a defense to prosecution for any of these offenses involving a detectable amount of methamphetamine or delta-9-tetrahydrocannabinol if the person can prove that he or she had a valid prescription for these drugs.

Public employees – right to run for office. 2003 Wis. Act 79, creating sec. 66.0501(5), Stats., effective December 6, 2003.

No municipality may prohibit a public employee (otherwise eligible) from running for elective public office or require the employee to take a leave of absence as a condition of candidacy.

License suspension for repeat theft of gasoline. 2003 Wis. Act 80, amending and creating sections within sec. 943.21, Stats., effective December 6, 2003.

Gas stations have been added to places protected against fraud (e.g., hotels and restaurants), and repeat theft violations are punishable, in part, by driver's license suspensions ranging from 6 months to one year. To be enforceable in municipal court, this change will have to be enacted by the municipal governing body.

Juvenile records – disclosure changes – notice on truancy cases. 2003 Wis. Act 82, amending secs. 938.342 and 938.396(2), effective December 6, 2003.

Where a truant is required to attend school as part of a dispositional order, clerks are now required to notify the school of this fact within 5 days after the order is entered. In addition, the order must specify what constitutes a violation and must direct the school to notify the court within 5 days after a violation of the order occurs. Further, the list of authorized requesters for confidential juvenile records held by a municipal court has been expanded to include other municipal courts, other town, village, or city attorneys, and the defendant's attorney on a proceeding in another municipal court.

Reimbursement for Jail Costs. 2003 Wis. Act 28, creating sec. 302.373, Stats., effective June 3, 2003. A city, village, or town may now sue a defendant to recover the costs of a commitment to the county jail or house of correction incurred after the effective date. The action must be filed within 12 months after the defendant is released or be barred. The amount of any such judgment may be reduced by any support or maintenance obligations the defendant may have.

Increase in Crime Lab fee. 2003 Wis. Act 33, sec. 2100, amending sec. 165.755(1)(a), Stats., effective July 26, 2003.

The crime lab and drug law enforcement assessment has been increased from $5 to $7.

Increase in Court Support Services fee. 2003 Wis. Act 33, sec. 2708, amending sec. 814.634(1)(a), Stats., effective July 26, 2003.

The court support services fee has been increased from $52 to $68, which increases the cost of an appeal to circuit court by $16.

Court Cost distribution. 2003 Wis. Act 33, sec. 2714, amending sec. 814.65(1), Stats., effective July 26, 2003.

The $5 portion of court costs assessed on each case is now payable by the municipal treasurer to the secretary of administration rather than the state treasurer.

Reduction of BAC from .10 to .08. 2003 Wis. Act 30, amending numerous

sections, effective September 30, 2003.

The prohibited blood alcohol concentration is lowered from .10 to .08 for operating a motor vehicle, motorboat, all-terrain vehicle, and snowmobile. For first offenders convicted of operating with a BAC between .08 and .10, courts cannot impose assessments, surcharges, or court costs and cannot order an alcohol assessment. However, a conviction on a charge of operating under the influence will result in the same penalties as exist now. Thus, where a defendant is convicted under both OWI and BAC charges, we must specify to DOT the subsection under which the sentence is imposed, i.e., sec 346.63(1)(a), Stats., for OWI, or sec. 346.63(1)(b), Stats., for BAC.

NEW PUBLISHED CASES

Cases Relating to Court Procedures and Rules of Evidence

A JUDGE MAY NOT PARTICIPATE IN PLEA BARGAINING IN CRIMINAL CASES – A NEW BRIGHT LINE RULE.

State v. Williams, 2003 WI App 116, 265 Wis. 2d 229 (Ct. App.2003) (No. 02-1651–CR, decided May 1, 2003)

Just before a jury trial was to begin, the trial judge invited the parties "to have a little chat in chambers." When they emerged, defendant pled to amended charges. However, at a later sentencing hearing defendant was surprised to receive a much longer prison term than he expected as a result of the chambers chat. His effort to withdraw his plea was unsuccessful and he appealed.

Because a plea of guilty or no contest must be voluntary, and because a judge's participation in plea bargaining has the very strong potential to destroy the voluntariness of the plea, the court of appeals established a bright line rule prohibiting all judicial participation in plea bargaining in criminal cases before an agreement is reached. Once the agreement is reached, the judge may be informed of the agreement before the guilty plea is formally offered to encourage a greater degree of certainty that the bargain will be accepted. As a result, the case was remanded to allow defendant to withdraw his plea of guilty.

Cases Relating to Search and Seizure; Reasonable Suspicion; and Probable Cause for Arrest.

REASONABLE SUSPICION – WHERE OFFICER HAS KNOWN DRIVER MORE THAN 9 YEARS AND KNOWS DRIVER NEVER HAD A LICENSE DURING THAT PERIOD, IT IS NOT A 4TH AMENDMENT VIOLATION TO STOP THE DRIVER EVEN THOUGH OFFICER HAS HAD NO CONTACT WITH DRIVER IN PAST 11 MONTHS.

State v. Kassube, 2003 WI App 64, 260 Wis. 2d 876 (Ct. App. 2003) (No. 02-2334-CR, Feb. 19, 2003)

A Black Creek police officer knew defendant for between 9 and 12 years, and during that entire period the officer knew defendant didn't possess a Wis. driver's license. When he saw defendant driving, he pulled him over for driving without a license although he had not had contact with defendant for a period of up to 11 months. During the traffic stop controlled substances were found in defendant's possession. Defendant's motion to suppress for lack of reasonable suspicion was denied by the trial court.

The court of appeals affirmed. It held that it was reasonable for the officer to conclude that since defendant had not obtained a license in the previous 9 years he probably had not done so in the past 11 months. The court, however, distinguished this from the situation where a driver's license is temporarily suspended since the driver could have regained the license at any time without the officer's knowledge.

POLICE MAY TEMPORARILY DETAIN AN INDIVIDUAL WHO IS REASONABLY SUSPECTED OF VIOLATING A CIVIL TRAFFIC ORDINANCE.

State v. Colstad, 2003 WI App 25, 260 Wis. 2d 406 (2003)

Colstad was driving down a straight clear road at about sunset. There were no cars or trees obscuring his view. The speed limit was 25 MPH.
Colstad, however, collided with a child causing severe injuries which later proved fatal. According to the first officer on the scene, Colstad told him that the child darted into the road and collided with the side of his
vehicle. Because he knew there were a lot of children living on the street he was traveling below the speed limit.

After speaking with Colstad for several minutes the officer directed him to wait at a location away from the accident scene. During this first contact the officer did not notice any signs of intoxication but still directed Colstad to wait at a location nearby. Forty-five minutes later, after helping to clear the accident scene, the officer contacted Colstad again and this time noticed a mild odor of intoxicants. Colstad admitted to drinking earlier that evening and agreed to take a PBT. He

blew a .11% and was subsequently arrested.

Colstad moved to suppress the blood test by claiming the officer did not have probable cause or reasonable suspicion of the commission of a crime, nor did he have probable cause to believe he had committed a civil traffic violation. He claimed his initial detention was improper. The court of appeals ruled that the officer had reasonable suspicion that Colstad was guilty of a civil traffic violation (inattentive driving) and that his temporary detention was lawful. Consequently, a temporary detention is lawful if supported by reasonable suspicion that a crime or a civil traffic violation has been committed

AFTER DEFENDANT PROVIDED A USABLE BREATH SAMPLE POLICE COULD NOT FORCE THE DEFENDANT TO TAKE A BLOOD TEST.

State V. Faust 2003 WI App 243, 267 Wis. 2d 783 (Ct. App. 2003)

The legality of the stop and arrest for OWI 3rd are not at issue here. After Mr. Faust arrived at the Sheboygan police department he agreed to submit to an breath test which returned a result of .09. The officer then decided that another chemical test was needed and asked Mr. Faust to submit to a blood test. When Faust refused a forced sample was drawn at the hospital with a test result of .10. Faust's attorney subsequently filed a motion to suppress the blood test on the grounds that since the breath test had provided a chargeable result there was no longer any exigency justifying a blood draw without a warrant. The circuit court agreed and suppressed the blood test results. The state appealed.

To decide this matter the court of appeals looked to the Supreme Court's holding in State v. Krajewski, 2002 WI 97, 255 Wis. 2nd 98 (2002), In Krajewski the high court had set out the criteria for warrantless/nonconsensual blood draws based on exigent circumstances. The four criteria are: the person must be legally under arrest for a drunk driving related violation, there must be a clear indication the draw will produce evidence of intoxication, the method used for the draw must be reasonable, and the defendant must offer no reasonable objection. Based on its reading of Krajewski the court of appeals held that once a useable test result is obtained, the exigency that allows for a forced blood draw is extinguished and therefore the forced blood draw in this case should be suppressed.

A FOOT IN THE DOOR WAS TOO MUCH FOR PURPOSES OF THE 4TH AMENDMENT

State v. Larson, 2003 WI App 150, 266 Wis. 2d 236 (Ct. App. 2003) (No, 02-2881-CR, June 18, 2003)

A Waukesha Sheriff's Deputy received two reports of a suspected intoxicated driver. As he began to look for a maroon and silver pickup truck he was given the address of the registered owner. He proceeded to an apartment complex and located the vehicle in the parking lot. He then went to Larson's apartment and knocked on the door. As Larson opened the door, the deputy placed his foot across the threshold of the doorway so that Larson would be unable to slam the door in this face. As he spoke with Larson he smell the odor of intoxicants and noticed that Larson's speech was slurred. Larson also told the deputy that he had just driven home from a bar, had not had a drink since he got home and was going to bed. Based on these facts, the deputy arrested Larson for OWI. Following the trial court's rejection of his 4th Amendment claims, he pled no contest and then brought this appeal.

The first question that the court of appeals had to decide was whether or not the a foot in the door constituted entry into Larson's apartment. Relying on State v. Johnson, 177 Wis. 2d 224, 227 (Ct. App. 1993), the court found that it did. To justify the entry into Larson's apartment the burden was on the state to show both probable cause and exigent circumstances. But all that deputy reasonably knew at the moment he stuck his foot across the threshold was that two tipsters thought Larson had been driving while intoxicated. Thus, the court reasoned, the deputy did not have probable cause to arrest until after he conversed with Larson with his foot in the door. The State was also unable to establish any exigent circumstances for the deputy's entry, namely that he was in hot pursuit, Larson was likely to flee, he was a threat to anyone or that he was going to destroy any evidence. The end result was the same ruling that the Supreme Court made in Welsh v. Wisconsin, 466 U.S. 740, 742 (1984), that warrantless entry into a person's home for a traffic offense cannot be made without both probable cause and exigent circumstances.

Cases Related to Specific Offenses

OFFICER MUST USE REASONABLE MEANS TO CONVEY IMPLIED

CONSENT WARNINGS. IT IS NOT REASONABLE TO FAIL TO TRY TO OBTAIN AN INTERPRETER FOR A DEFENDANT WHO DOES NOT SPEAK ENGLISH.

State v. Begicevic, 2004 WI App, 03-1223-CR, 2/4/04

Officer Kennedy of the City of Brookfield Police Department lawfully stopped the defendant. She immediately noticed a strong odor of intoxicants and bloodshot and glassy eyes. Although the defendant had a heavy accent and he asked her if she spoke German, she believed she was able to communicate her requests to him in English and she began to instruct him on field sobriety tests. He did not do well on these tests or the PBT. He was arrested for OWI and transported to the police department where he was read the Informing the Accused form.

Although Kennedy did not know this at the time, the defendant was born in Bosnia, but had lived in Wisconsin for six to eight years. Bosnian is his native tongue, but he speaks some German and English. Kennedy said:

> I noticed that he had a strong accent right away, and he did ask me if I spoke German; however, in communication, I believed I was able to get my point across either right away or speaking to him several times in explaining what I meant. He was able to communicate with me.

At the police station Kennedy was met by Officer Gasse, who had been monitoring Kennedy's calls to dispatch. Gasse volunteered to help because he had five years of schooling in German. Gasse testified that the defendant spoke broken German and that he communicated with the defendant with both German and hand motions. No effort was made to obtain a Bosnian interpreter or a fluent German interpreter.

Kennedy read the Informing the Accused form to the defendant. Gasse did not provide a verbatim translation nor did he explain the rights on the form to the defendant. After Kennedy read the form, Gasse was able to ask the defendant in German if he would take the test. Gasse needed to word the question one or two different ways in both German and English and made hand motions. The defendant eventually took the test. He failed.

The defendant filed a motion to suppress the test result because he was not reasonably informed of his implied consent warnings. The trial court denied the

motion to suppress. The court of appeals reversed the trial court because the officer did not use reasonable means to convey the implied consent warnings. The case was remanded back to the trial court for a possible order stripping the breath test result of its automatic admissibility. The test result could be admitted at trial if the state can establish the admissibility of the test, including a proper foundation for the test. Suppression of the test result is NOT the proper remedy for failure to use reasonable methods to meet the terms of the implied consent law. Suppression is the proper remedy only if evidence is obtained in violation of a constitutional right, or if a statute specifically provides for suppression.

The court of appeals clearly stated that the issue is NOT whether the defendant understood the implied consent warnings given to him. Rather the question is whether, under the circumstances, reasonable methods were used to convey the implied consent warnings to the defendant. Because Kennedy did not attempt to obtain an interpreter and because Gasse did not try to translate the form verbatim and did not make an effort to explain the form in German, the state's attempts to inform the defendant under the implied consent law were manifestly unreasonable.

THE LANGUAGE IN THE INFORMING THE ACCUSED FORM DOES NOT UNCONSTITUTIONALLY COERCE THE DEFENDANT TO TAKE A TEST.

State V. Wintlend, 2004 WI App 314, 258 Wis. 2d 875 (Ct. App. 2002), Rev. Denied 1/14/03.

The defendant was arrested for OWI. The Informing the Accused form was read to him and he consented to taking a blood test. He tested .183%. The defendant contended that when he was read the Informing the Accused form by the officer, the language of that form contained a threatened sanction, namely the loss of his driving privileges unless he consented to take the test. He maintained that this threat constituted a coercive measure that invalidated his consent under the Fourth Amendment. The trial court rejected his motion to suppress and the defendant appealed.

The court of appeals firmly rejected this argument and confirmed the ruling of the trial court. The court noted that under the state's Implied Consent law, the giving of consent to take the test occurs at the time a person obtains a driver's license. Further, the court said that even if there is coercion at the time the Informing the

Accused form is read, it is an entirely reasonable form of coercion.

OWI SENTENCING GUIDELINES ARE CONSTITUTIONAL

State v. Jorgensen, 2003 WI 105, 264 Wis. 2d 157 (2003) (No. 01-2690-CR, decided July 11, 2003)

Defendant was found passed out in her car, in a ditch, and tested at a blood alcohol level of .276. She was convicted of OWI at a jury trial. It was her 4th offense. The trial court sentenced her to 7 months in jail after applying the Fifth Judicial District OWI Sentencing Guidelines created pursuant to sec. 346.65(2m)(a), Stats. On appeal, defendant argued that the sentencing guidelines were improperly applied to her, and that the guidelines were unconstitutional because they increased sentencing disparity based upon the geographical location of the offense.

Although the sentencing guidelines only apply to convictions under sec. 346.63(1)(b), Stats., (BAC convictions) and not those under sec. 346.63(1)(a), Stats., (OWI convictions as in this case), it is proper, the Supreme Court held, for a court to consider the guidelines in sentencing on an OWI conviction but the court should not apply them "by rote" in those cases. In this case, it was thus proper for the trial judge to apply them since he also made reference to other factors in deciding upon the 7-month sentence.

With regard to the constitutional challenge, the court held that there was a rational basis to establish different guidelines in different parts of the state, namely the reduction of sentencing disparity within the districts themselves. Although acknowledging that statewide guidelines might reduce disparity even more, the court stated that having some guidelines within districts was better than having no guidelines at all.

MUNICIPAL COURT'S TRIAL DECISION PRECLUDES SUBSEQUENT CIVIL LAWSUIT BETWEEN SAME PARTIES.

Masko v. City of Madison, 2003 WI App 124, 265 Wis. 2d 442 (Ct. App. 2003) 665 N.W.2d 391 (Ct.App. 2003)

Masko was in an accident with a City of Madison bus while driving her car and was cited for making an improper lane change. Her case was tried before the

Madison Municipal Court and she was found guilty. She filed a jury appeal but later voluntarily dismissed it. She then filed a civil lawsuit against the city claiming that the bus driver had moved into her lane and caused the accident. The trial court ruled that the doctrine of issue preclusion barred the case since the issue of liability had been fully litigated in municipal court.

On appeal, the court of Appeals affirmed. Two issues had to be resolved. First, was there sufficient identity between the parties in both cases; since they were exactly the same parties the answer was easy. Second, was issue preclusion consistent with fundamental fairness. The court looked at the five factors which must be weighed and decided in the affirmative. Included in these were the fact that the burden of proof in municipal court was actually higher than that in the civil action, and that there were no significant differences in the quality or extensiveness of the proceedings in the two courts. Thus, the civil lawsuit could not go forward.

IF A MUNICIPAL JUDGE GRANTS A DEFENSE MOTION TO DISMISS AFTER THE PROSECUTOR HAS RESTED THE MUNICIPALITY CANNOT APPEAL

City Of Pewaukee v. Carter, 2003 WI App 260, 673 N.W. 2d 380 (Ct. App. 2003) 03-114 (2003)

This is another case in which the facts are not in dispute. Mr. Carter was cited for both OWI and operating with a PAC. At his trial in municipal court the city presented three witnesses. The arresting officer who had also arranged for the blood draw was not present, however. Due to his absence, the prosecutor informed the judge that it would not be moving to have the blood test result admitted and rested his case. He also indicated that he did not want an adjournment. Carter 's attorney then moved for a dismissal claiming the city had not met its burden of proof. The judge agreed noting, "I don't think there was enough evidence here to go on with a drunk driving case if you don't have the arresting officer". The city appealed.

The controlling case that the appeals court looked to was Village of Menomonee Falls v. Meyer 229 Wis. 2d 811 (Ct. App. 1999*)*. In Meyer the court held that under Sec. 800.14(4) an appeal for a new trial is not available if the merits of the case had not been fully litigated. Although the City argued that Meyer was not controlling because it involved a pretrial motion in limine regarding the exclusion

of a police report, the court of Appeals disagreed. Relying on the legislative intent and the explicit language of Meyer that, "a full trial of the parties's issue in the municipal court is a condition precedent to a 'new' trial in circuit court." The bottom line for now is that if a municipal judge grants the defense's motion to dismiss following the completion of prosecution's case, the municipality will not be able to appeal the ruling. A strong dissent by Judge Brown suggests that this may not be the last word.

UNPUBLISHED CASES

The following cases have been included because they involve legal questions that municipal judges frequently encounter. Since they are unpublished, however, they cannot be used as precedent to support any decision or ruling in your court.

WARRANTLESS ENTRY TO THE HOME OF A HIT & RUN DRIVER DEEMED ACCEPTABLE UNDER THE EMERGENCY EXCEPTION
State v. Maas, 09/23/2003 ***UNPUBLISHED CASE***

Brian Maas drove his pickup onto a lawn and collided with a cement porch. Although the impact of the collision detached the porch from the house, Mr. Maas managed to drive home, park the truck in his driveway and go into his residence. Shortly after the accident an eyewitness gave police the plate number and an account of what happened. After running the plate the officers went to Maas's residence. There they found the truck with the airbags deployed and massive front end damage. The windshield was intact, however, and there was no evidence of blood. After getting no response at the front door the officers went to the back door and found it unlocked. One of the officers then called a supervisor to get permission to enter the house to see if anyone was injured. After receiving the okay the police went in. They found Mr. Maas asleep in bed. Upon waking him up they conducted field sobriety tests and subsequently arrested him for OWI 2nd.

Maas's attorney filed a motion to suppress the evidence claiming that the officer's concern about Maas's welfare was only a pretext to get into the house to investigate criminal activity. The court of appeals noted that whenever the police invoke the emergency exception to justify a warrantless intrusion based on the belief that someone needs immediate assistance or aid, the reviewing court must apply a two prong test, State v. Rome, 2000 WI App 243, 13. The first prong is the subjective one, whether the officer was actually motivated by a perceived need to render assistance and the second is the objective test: whether a reasonable person under the circumstances would have thought an emergency existed. After applying both of these prongs to the facts of this case the court of appeals held that both had been met by the state and affirmed the decision of the circuit court.

ARREST AT FUNERAL HOME BUILDING SITE LAID TO REST

State v. Graef, 10/15/03 ***UNPUBLISHED CASE***

In the aftermath of a fight with his girl friend, Mr. Graef decided to sleep elsewhere. The site he chose, however, was not your local Motel 6. Instead he went to the building site of a Church and Chapel Funeral Home where he was the contractor, parked his truck with the engine running and went to sleep. When someone reported a suspicious vehicle the police came out to investigate. They found Graef asleep in his truck and upon waking him discovered that he could not pass and field sobriety tests and following his arrest for OWI blew a .19. Graef's attorney filed a motion to dismiss the charges claiming that the construction site was not "premises held out to the public for the use of their motor vehicles," pursuant to Sec. 346.61. After the crcuit court denied the motion Graef appealed.

To resolve the issue of whether this construction site was "held out to the public" for motor vehicle access and use, the court of appeals turned to City of LaCrosse v. Richling, 178 Wis. 2d 856, (Ct.App. 1993). The Richling test asks whether, "on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." The State argued that since there were no signs or fencing barring access by the public, the site was available to the public. Construction workers testified that they were not permitted to park on the site and that Graef only allowed delivery vehicles to enter the site. In reversing the circuit court the court of appeals wrote, "The State ignores the qualifying phrase *authorized manner*-the funeral home was under construction;...the public would not have a legitimate reason for using the roughly graded construction site."

FAILURE TO KEEP SUSPECT UNDER CONTINUOUS OBSERVATION FOR 20 MINUTES PRIOR TO ADMINISTRATION OF A BREATH TEST DOES NOT AFFECT THE ADMISSIBILITY OF THE TEST.

City of Fond du lac v. Binotto, 04/2003 ***UNPUBLISHED CASE***

Although the defendant was in the arresting officer's presence for more than twenty minutes prior to administering the breath test, he was not under "continuous observation". Wis. Admin. Code TRANS 311.06(3)(a) requires "Observation by a law enforcement person or a combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath

specimen…" Because the observation was not continuous, the defendant asked the court to strip the test result of its presumption of automatic admissibility.

The trial court denied the defendant's motion. The court of appeals upheld the trial court. The court of appeals cited City of New Berlin v. Wirtz, 105 Wis. 2d 670 (Ct. App. 1981) to hold that a purported violation of the administrative code does not strip the test result of its statutorily established prima facie presumption of accuracy. Issues concerning compliance with the administrative code go to the weight of the evidence and not to the admissibility of the test.

UNDER CERTAIN CIRCUMSTANCES, FAILURE TO SIGNAL A TURN CAN PROVIDE REASONABLE SUSPICION TO JUSTIFY AN INVESTIGATORY TRAFFIC STOP.

State of Wisconsin v. Steffes, 9/17/03 ***UNPUBLISHED CASE***

A deputy sheriff received a report from an anonymous tipster about a possible drunk driver. The deputy went to the area and observed a vehicle matching the description. He followed the vehicle and observed the vehicle come to a complete stop at a "T" intersection. He observed the vehicle turn right without signaling the turn. As the deputy approached the same intersection he observed two vehicles approaching from the left and traveling in the same direction that the suspect vehicle had turned. The officer decided to stop the vehicle. One thing led to another and the defendant was under arrest for OWI. The defendant challenged the stop of his vehicle. He cited Sec 346.34(1)(b), Stats. which states "In the event any other traffic may be affected by such movement, no person may so turn any vehicle without giving an appropriate signal…" The defendant claimed that traffic was not affected by his failure to signal his turn. Consequently, the officer did not have grounds to stop him. The trial court disagreed and found reasonable suspicion for the stop.

The court of appeals affirmed the trial court. The court held that "an investigatory stop is justified if a reasonable officer could conclude that the failure to signal a turn deprived drivers of a warning of the change of direction or the time needed to safely react to the change of direction."

ONE CAR ACCIDENT, AN ODOR OF INTOXICANTS AND AN

ADMISSION TO DRINKING CAN PROVIDE PROBABLE CAUSE FOR AN ARREST FOR OWI.

State of Wisconsin v. Wundrow, 12/16/03 ***UNPUBLISHED CASE***

A deputy sheriff was dispatched to the scene of a one-vehicle rollover. Upon arrival she observed the defendant lying outside the truck. An EMT was attending to him. The deputy noticed an odor of intoxicants. The deputy did not talk to the defendant or offer any field sobriety tests because he appeared to be injured. She was able to speak with the defendant's brother who had been a passenger in the vehicle. The brother said that the defendant was attempting to pass another vehicle when he hit the ditch and lost control of the vehicle.

The defendant was transported to the hospital and the deputy followed. At the hospital the deputy was able to talk to the defendant and he admitted drinking. The deputy then placed the defendant under arrest for third offense OWI.

The defendant filed a motion to suppress evidence arguing that there was insufficient probable cause for his arrest. The trial court denied the motion. The defendant appealed to the court of appeals.

The defendant argued that the complete lack of field sobriety tests would make it impossible to find probable cause. He also argued that there were innocent and reasonable explanations for the accident, such as mechanical failure or bad road conditions.

The court upheld the trial court's ruling that there was sufficient probable cause. The court concluded that the lack of field testing does not preclude a finding of probable cause. The court said that the defendant was executing a fairly simple maneuver, passing another vehicle. In addition, the deputy noted an odor of intoxicants and the defendant admitted drinking. The court found it "more than reasonable under these circumstances to conclude that the defendant was probably operating while under the influence. The court further stated "the mere fact that an innocent explanation for a driver's conduct may be advanced is not enough to defeat probable cause."

DISTINCTION BETWEEN "REASONABLE SUSPICION" AND "PROBABLE CAUSE" FOUND CRITICAL IN OWI STOP – BURDEN OF

PROOF IN SUPPRESSION HEARINGS

City of New Berlin v. Barker, 9/17/03 ***UNPUBLISHED CASE***

Barker was pulled over around 2:00 a.m. after an officer observed him approach a stop sign "too fast," drift from side to side within his own lane, and make one slight cross over of the center line. A traffic stop resulted in an OWI charge. Barker moved to suppress the drunk driving evidence contending that there was no legal basis for the stop, and the municipal judge held a suppression hearing. At the hearing, the judge decided that there was no clear, satisfactory, and convincing evidence supporting probable cause for the stop and dismissed the charge.

On appeal to the circuit court, the decision was reversed on two grounds: use of wrong burden of proof and failure to apply the reasonable suspicion standard rather than probable cause. On appeal to the court of appeals, the circuit court was affirmed. The court held that reasonable suspicion was the correct standard to apply and that Barker's "erratic driving pattern" met the test. The court interestingly noted that there is no clear precedent in Wisconsin as to what burden of proof applies in a suppression hearing. It declined to resolve the issue, concluding that the facts met all three burdens (preponderance; clear, satisfactory and convincing; and beyond a reasonable doubt).

REASONABLE SUSPICION ABSENT IN STOP BASED ON PAST CRIMINAL ACTIVITY AND UNVERIFIED TIP ON CURRENT CRIMINAL ACTIVITY

State v. Schouten, 10/02/03 ***UNPUBLISHED CASE***

Schouten and Peachey were walking down Main St. in Waupun at about 2:00 a.m. when observed by a patrol officer. The officer had arrested Schouten 4 months earlier for possession of marijuana and drug paraphernalia. In addition, he knew of a month-old anonymous, unverified tip that Shouten was selling illegal drugs and that there had been several burglaries in the area recently. When the officer approached them the two men continued walking and did not appear alarmed. They refused to consent to a search but the officer frisked them anyway; marijuana was found on Schouten. He won a suppression motion in circuit court and the state appealed.

Applying Terry standards to the stop the court of appeals affirmed the decision, finding that the officer lacked reasonable suspicion to stop Schouten. There was no indication that he possessed illegal drugs on the night of the stop and nothing to connect him to the recent burglaries. Schouten's demeanor after seeing the officer did not suggest recent or anticipated criminal activity. Thus, the stop was determined to be illegal and the court found it unnecessary to decide whether the frisk was.

COURT SHOULD BALANCE SIX FACTORS WHEN DETERMINING WHETHER TO GRANT A CONTINUANCE.

State v, Davies, 4/03 ***UNPUBLISHED CASE***

The court of appeals describes the record in this case as " unclear about many facts". To make a long story short… Vernon County Circuit Court scheduled a refusal hearing on 7/8/02. On 6/11/02 the defendant's attorney requested a continuance of the hearing due to a scheduling conflict. On 6/25/02 the attorney contacted the court's clerk to reschedule, but the clerk was unwilling to change the date without the judge's approval. On 7/3/02 the attorney sent a fax to the judge again requesting a continuance. The record does not show any response to this request. On 7/8/02 the defendant and his attorney did not appear at the refusal hearing. The court found that the defendant had unreasonably refused to take the test and revoked his driver's license. The defendant appealed. The court of appeals cited Phifer v. State, 64 Wis. 2d 24, 218 N.W.2d 354 (1974) in holding that circuit courts have the discretion to grant or deny a continuance. Six factors are to be balanced in determining whether a continuance is appropriate: (1) length of the requested delay; (2) availability of other competent counsel; (3) whether the party had requested and received other continuances; (4) convenience or inconvenience to the parties, witnesses and the court; (5) whether the request is legitimate or dilatory; and (6) other relevant factors.

The court of appeals concluded that the record was inadequate to uphold the court's order denying the continuance and revoking the defendant's license.

ANONYMOUS TIP MUST HAVE SOME CORROBORATION TO PROVIDE REASONABLE SUSPICION

State v. Nguyen, 04/01/2003 ***UNPUBLISHED CASE***

Shortly after midnight, a City of Hudson police officer received a dispatch regarding two possibly intoxicated drivers who were just leaving the Amoco Auto Stop. Dispatch provided the officer with descriptions of both cars and their license plate numbers. Within minutes he spotted the two cars and immediately pulled both vehicles over. Dung Tran Nguyen, one of the drivers, was eventually charged with OMVWI. Prior to trial, Nguyen's attorney filed a motion to suppress the evidence arguing the stop was unlawful. The only witness for the State at the suppression hearing was the arresting officer. The trial court held that the anonymous tip provided sufficient reasonable suspicion for the initial stop and denied the motion.

On appeal the court of appeals reversed the trial court. Relying on State v. Rutzinski, 2001 WI 22, 242 Wis. 2d 729 the Court noted that neither the dispatcher nor the original informant were called to testify at the suppression hearing. Therefore, the anonymous tip lacked "the reasonable indicia of reliability" necessary to support reasonable suspicion in such instances.

DISMISSAL OF A DEFECTIVE TAIL LAMP VIOLATION DID NOT TAKE AWAY THE PROBABLE CAUSE FOR THE INITIAL STOP AND REQUIRE DISMISSAL OF THE DEFENDANT'S CONVICTION FOR OWI

Village of Elm Grove v. Johnson, 06/18/03 ***UNPUBLISHED CASE***

Around 1:00 a.m., an Elm Grove police officer noted that the vehicle he was following had a burned out tail lamp bulb. Since 347.13(1), Stats., requires that all tail lamp bulbs be in "good working order", the officer initiated a traffic stop. The smell of alcohol on Johnson's person led to field sobriety tests that resulted in his arrest for OWI.

At trial, the municipal judge reasoned that since only one tail lamp bulb was not working Johnson was not guilty of violating Sec. 347,13(1), Stats., but found him guilty of OWI. On appeal, the circuit court rendered the exact same decision.

Relying on State v. Longcore, 233 Wis 2d 278 (2000), Johnson argued that the dismissal of the defective tail lamp violation conclusively established the officer's misinterpretation of the law "and thus by definition there can be no probable cause

that a violation has occurred." The court of appeals, however, found that Longcore was not controlling since the alleged violation here did have a statutory basis and the trial court's disagreement with the officer was based on a generous reading of what "good working order" constituted. Thus, a lawful stop can be predicated on a violation which the trial court later dismisses based on its application of facts to law.

COUNTY PARK ROAD QUALIFIES AS A "HIGHWAY" FOR PURPOSES OF ENFORCING APPLICABLE TRAFFIC LAWS

State of Wisconsin v, Knuth, 6/6/03 UNPUBLISHED CASE

Knuth was arrested and convicted of third offense OAR and seventh offense OWI while driving on a county park road which at the time of his arrest was open only to registered campers.

On appeal, Knuth argued that the county park road on which he was traveling when he was stopped was not a "highway" because at night only registered and registering campers could legally use the roadway. Sec 340.01(22) Stats., provides that a "highway" includes "those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for vehicular travel...." Unfortunately for Knuth the court of appeals refused to adopt the exception he sought, namely that unauthorized use of a park road effectively precludes it from being considered a "highway". A park road cannot be a "highway" during the day and something else at night.